

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555 (JMP) and 08-01420 (JMP) (SIPA)

Adv. Case Nos. 09-01177 and 09-01178

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

LEHMAN BROTHERS HOLDINGS, INC. /

LEHMAN BROTHERS SPECIAL FINANCING, INC.

Plaintiff.

-against-

LIBRA CDO, LTD.,

Defendant.

(cont'd. on next page)

1 U.S. Bankruptcy Court
2 One Bowling Green
3 New York, New York

5 August 26, 2009
6 10:04 a.m.

8 | B E F O R E :

9 HON. JAMES M. PECK

10 U.S. BANKRUPTCY JUDGE

12 CASE CONFERENCE

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2 HEARING re Debtors' Motion to Engage Citadel Solutions LLC on
3 an Interim Basis [Docket No. 4717]

4

5 HEARING re Motion of Lehman Brothers Holdings Inc., et al. for
6 Authorization and Approval of Settlement with Lehman Re Ltd.
7 [Docket No. 4716]

8

9 HEARING re Debtors' Motion for Authorization to Implement
10 Alternative Dispute Resolution Procedures for Affirmative
11 Claims of Debtors Under Derivative Contracts [Docket No. 4453]

12

13 HEARING re Debtors' Motion for an Order Enforcing the Automatic
14 Stay and Holding Shinsei Bank in Contempt for Violating the
15 Automatic Stay [Docket No. 4764]

16

17 RE: SIPC PROCEEDINGS:

18 HEARING re Second Application of Hughes Hubbard & Reed LLP for
19 Allowance of Interim Professional Compensation for Services
20 Rendered and Reimbursement of Actual and Necessary Expenses
21 Incurred from February 1, 2009 through May 31, 2009 [Docket No.
22 1292]

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VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

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2 HEARING re Unclaimed Property Recovery Service's Motion for
3 Orders (A) Compelling Payment of Unclaimed Funds by the New
4 York State Comptroller, (B) Lifting the Automatic Stay, or,
5 Alternatively, Providing Relief from the Automatic Stay, (C)
6 Allowing Payment for Services Provided Postpetition and (D)
7 Other Relief [Case No. 08-13555, Docket No. 3345]

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9 RE: ADV. CASE NOS. 09-01177 AND 09-01178:

10 HEARING re Motion for Summary Judgment; Defendant's Cross-
11 Motion for Summary Judgment

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24 Transcribed by: Clara Rubin

25 Penina Wolicki

1 and then we'll go to the next matter.

2 MR. KRASNOW: Yes, Your Honor.

3 (Recess from 10:59 a.m. to 11:02 a.m.)

4 THE COURT: Be seated. I never should have even
5 thought about another date. The 15th is really the only date
6 that works. My courtroom deputy suggested if I want to start
7 sitting on a Saturday we could do it on a Saturday, but that's
8 not going to work for anybody I don't think. So, the 15th on
9 the omnibus day and anybody who now wishes to be excused is
10 free to leave and then we can move onto the next set of
11 matters.

12 MR. KRASNOW: Your Honor, should we wait a moment
13 and --

14 THE COURT: Sure.

15 (Pause)

16 MR. KRASNOW: Your Honor, bear with us for a moment.

17 THE COURT: I've been bearing with you for almost a
18 year.

19 (Pause)

20 MR. KRASNOW: Your Honor, I think we're ready.

21 Richard Krasnow, Weil, Gotshal and Manges on behalf of the
22 Chapter 11 debtors.

23 The next and final matter on today's calendar is the
24 debtors' motion for an order enforcing the automatic stay and
25 holding Shinsei Bank in contempt for violating that stay. Your

1 Honor, let us be clear that this motion relates to the facts in
2 this case, not any facts that might be alleged in some
3 hypothetical motion, facts not before this Court and which
4 while alleged refer to in various pleadings filed in response
5 to this motion, represent nothing but speculation and
6 conjecture as to what the debtors' position might or might not
7 be in connection with matters that have not yet come into
8 existence in any court.

9 THE COURT: But Mr. Krasnow, one of the problems with
10 taking that position is that to the extent that there is a
11 determination made with respect to the application of the
12 automatic stay cross-border in Tokyo and the administration of
13 a Tokyo insolvency case, the principles would appear to be
14 comparable to the principles who would apply in any other
15 insolvency proceeding affecting Lehman anywhere else on the
16 globe. And so it becomes difficult, I'm just making this point
17 so that I see this as a situation contrary to your present
18 articulation which establishes a principle that probably does
19 have broad application. And for that reason, I welcome and
20 will hear all of the objectors who have raised questions that
21 you've demonized as hypothetical.

22 MR. KRASNOW: Your Honor, I wouldn't say we demonized
23 it.

24 THE COURT: Well, maybe I overspoke, but I think it's
25 pretty close.

1 MR. KRASNOW: But, Your Honor, the issues and the
2 facts specific to this case could well exist and indeed there
3 is a proceeding in California, as Your Honor is aware, where
4 there is a similar situation. And so the questions of comity,
5 full faith and credit, what may occur in a bankruptcy
6 proceeding involving a non-Lehman debtor in Delaware,
7 California or a proceeding that is pending in Japan or anywhere
8 else is, in our view, not at issue. The question is, in our
9 view, is whether or not conduct of this creditor, the conduct
10 in another court whether that court is in Japan or in another
11 state, is conduct which violates the automatic stay. The
12 target here is not, as suggested by Shinsei and some of the
13 other objectors, the jurisdiction authority of courts outside
14 of this court to exercise their jurisdiction. We're not here
15 today suggesting to the Court that the Japanese court, that the
16 court supervisor doesn't have the jurisdiction to determine the
17 issues that have been presented to it. We're not asking this
18 Court to divest those other courts, to divest the court
19 supervisor of the jurisdiction that it has. Rather, the focus
20 here is whether or not by invoking the court's jurisdiction the
21 creditor has violated the automatic stay. This is no different
22 in that respect than if Shinsei Bank or a creditor had
23 commenced an action in some court seeking a recovery from the
24 Chapter 11 debtors.

25 The court in which they commenced the action may well

1 have the jurisdiction to consider the issue, the subject matter
2 jurisdiction, it may have in personam jurisdiction over all the
3 parties, but that doesn't mean that what that creditor has done
4 and what we allege Shinsei has done is permitted under the
5 automatic stay. So to that extent, Your Honor, that is the
6 reason why we say comity is really not at issue. The protocols
7 that this court has approved and is endorsed as we have is not
8 at issue. There is nothing in the protocols that is intended
9 to modify the rights that the debtors otherwise have to the
10 protections afforded to them under the automatic stay. And so
11 that's really the reason why, Your Honor, we've said that these
12 hypotheticals, which have been conjured up, really have no
13 bearing here because this motion is specific; it relates to the
14 specific facts of this case, it relates to precisely what
15 Shinsei has done and the question is whether or not that
16 conduct, that conduct, is violative of the automatic stay.

17 THE COURT: Now, my understanding as to what Shinsei
18 has done is that consistent with procedures applicable to
19 insolvency proceedings in Japan, they have permissibly filed an
20 alternative plan in the Tokyo district court which, if
21 approved, would result in an outcome detrimental to the
22 interests of Lehman. Whereas, if the Lehman plan were approved
23 there would be an outcome detrimental to the interest of
24 Shinsei in relative terms. Do I have it right or wrong?

25 MR. KRASNOW: If I can characterize it somewhat

1 differently, Your Honor?

2 THE COURT: Sure. But I'm trying to understand the
3 basics.

4 MR. KRASNOW: Your Honor, can I answer the question by
5 going through what we believe and to a large extent has not
6 been contested by Shinsei as the facts, the relevant facts as
7 they pertain to the --

8 THE COURT: I don't want to interfere with your
9 argument at all. I'm really focused on the comity issue which
10 you said is not part of this dispute, because it seems to me
11 that it is and I need to understand why you assert that it's
12 not. Because if what you are saying is that a Japanese
13 creditor in Japan cannot permissibly assert a position in a
14 local court that would otherwise be assertable in that court
15 without first coming to this court to obtain relief from the
16 automatic stay where that action would be potentially
17 detrimental to the property interests of Lehman, I think that
18 does raise a comity issue. And we can discuss that at some
19 point in the argument. I want you to know, and that's why I've
20 interjected, that I don't accept your original proposition that
21 this is just like it's happening in a state court or before
22 Judge Smith in the Central District of California in SunCal. I
23 view it as different.

24 MR. KRASNOW: Your Honor, even if it addresses a
25 comity issue, comity, as far as I am aware, is not a defense to

1 a action taken by a creditor that otherwise violates the
2 automatic stay. And the focus here -- comity, as I understand
3 it, really relates to the relationship between the courts and
4 it's an international variation, if you will, of full faith and
5 credit. And as I noted earlier, this is not a full faith and
6 credit issue. It's not a question of whether or not another
7 court in the United States or a court in Japan has jurisdiction
8 and whether or not that jurisdiction should be recognized by
9 this court or whether the Japanese court should recognize the
10 jurisdiction of this court. It is rather focused on the
11 actions of the debtor.

12 To answer your question as to what Shinsei has done,
13 broadly speaking that's correct but the manner in which they
14 are effectuating what Your Honor has described, is what is at
15 issue here. It's not simply proposing another plan where
16 Lehman's recoveries would be different than what is proposed,
17 not under the Lehman plan but the Sunrise Finance plan. It is
18 that they are taking a position with respect to that which
19 would result in a reduced recovery, which in our view violates
20 the stay. It is not defensive in nature. It is offensive in
21 nature. And that, to us, is a critical difference and it is a
22 critical difference that has been recognized in this court.

23 If I may, Your Honor, just briefly touch upon some of
24 the facts as they relate to what is happening in Japan or has
25 happened, because it's relevant to exactly the point that I've

1 just raised.

1 what Sunrise's records reflected what was due. That dispute
2 was resolved when LBHI reduced the amount of its claim to the
3 amount reflected in Sunrise's books and records.

4 LB -- Sunrise, thereafter, approved, did not
5 challenge, the claim filed by LBHI as amended. Nobody else,
6 including Shinsei Bank, challenged or disputed the claim filed
7 by LBHI in its original amount or as amended.

8 It is our understanding, and is reflected in a
9 supplemental declaration by a Japanese counsel supports this,
10 that under Japanese law as a result of their not having been
11 any objections interposed to either LB Asia's claim or LBHI's
12 claim as amended, they are allowed valid claims. That, in our
13 view, is a pivotal point, Your Honor. Thereafter, Sunrise
14 filed a plan which contemplates a distribution, pro rata
15 distribution, of around twenty percent of allowed claims to
16 creditors similarly situated. And in that regard, it's our
17 understanding, LBH's claim, LBHI's claim and Shinsei Bank's
18 claim are all similarly situated and thus we would all get a
19 recovery of twenty percent.

20 Shinsei filed a competing plan. And it wasn't simply
21 a competing plan which suggested different classes of creditors
22 and the like, it was a plan where the material difference
23 between the Sunrise plan and its plan went and goes to an
24 attempt through the plan to equitably subordinate the Lehman
25 claims.

1 We accept and agree with the characterization in
2 Shinsei Bank's objection to what that means under Japanese law.
3 That is a reprioritization of claims. Claims, we submit, that
4 would otherwise be allowed. It is a means by which
5 distributions which would otherwise be made to Lehman in
6 respect of its allowed valid claims would be reallocated to
7 other creditors with the primary beneficiary being Shinsei
8 Bank. That is what is before the Japanese court. That is what
9 Shinsei Bank did. The issue, therefore, is fundamentally
10 whether or not that kind of action, whether it occurs in a
11 Japanese court, a court in the States, a court in another
12 foreign jurisdiction, is of the type that violates the
13 automatic stay.

14 Now, there are references throughout the pleadings
15 that have been filed in the objections of those filed by
16 Shinsei and by some of the other parties who are strangers to
17 this proceeding and whose objections, we submit, should simply
18 be overruled for the reasons set forth in our reply, that the
19 law is clear that once a Chapter 11 debtor participates in
20 another proceeding, call it a foreign proceeding, foreign to
21 the home court, if you will, this court, if you will, with
22 respect to Lehman, whether it is in Japan or elsewhere, that
23 the automatic stay cannot be utilized to prevent another party
24 from acting in a defensive matter in respect of a claim that's
25 been filed by the debtor. We agree, Your Honor. We cannot

1 file a claim in another Chapter 11 case or another
2 rehabilitation proceeding or a liquidation proceeding overseas
3 and simply contend that the other side, be it an administrator,
4 a liquidator or creditors in that case, if they have the right
5 in those -- under those governing laws of the foreign
6 proceeding to object to a plan, that we cannot stand up and say
7 our claim is valid, per se, you cannot challenge it, because to
8 do so would undercut our ability to get a distribution and
9 violate the automatic stay. That is not our position. That
10 shouldn't be our position. It can't be our position. We
11 accept the fact the defensive actions taken in respect of
12 actions taken by a Chapter 11 debtor are absolutely permitted.
13 It is our view, however, that the attempt to equitably
14 subordinate a claim is not defensive in nature. It is
15 offensive in nature.

16 And we point out, Your Honor, and the objectants point
17 out, one or more of them, that, in fact, that issue, which is,
18 again, I think goes to the core of our motion, is equitable
19 subordination defensive or offensive has really only been
20 addressed, as best as we can all determine based on our
21 pleadings, by three courts. And I used the address in the
22 sense of, at least as to two of the decisions that are referred
23 to by the parties, as at least mentioning subordination not
24 really analyzing the issues. Those three decisions are the
25 SunCal, as I will refer to as SunCal decision that I'm sure

1 Your Honor is aware of, which is, Your Honor, in another
2 matter, a Chapter 15 matter, is noted as the law of that case
3 and not this case, the court did there note its view that
4 equitable subordination was defensive. It was a conclusory
5 statement without any analysis. It is on appeal. But there is
6 absolutely no analysis of a fundamental difference between an
7 objection to claim and equitable subordination.

8 The other decision that I've alluded to that the other
9 parties rely upon is the decision in this court by Judge Drain
10 in the Miteom case.

11 In that particular case, the Chapter 11 debtor before
12 Judge Drain had filed a claim. A trustee in another case
13 objected to the claim and in its objection it also asserted as
14 alternative relief equitable subordination. The judge, in that
15 case, in our view, really didn't analyze a fundamental
16 difference between equitable subordination and objection.
17 Focused more on the objection to the claim, the challenge to
18 the validity of the claim, and in that context concluded that
19 the objection was permissible.

20 And as to equitable subordination, focused on the fact
21 that the trustee who had interposed these challenges contended
22 that it was not seeking affirmative relief and on those grounds
23 Judge Drain said, well, this is defensive in nature. We would
24 submit that we believe Judge Drain is wrong and that the
25 appropriate analysis to be undertaken is that which Judge

1 Gonzalez did in Enron, which we believe is on all fours with
2 this particular case.

3 In that case, Enron had asserted a claim in an Indiana
4 proceeding. An adversary proceeding was commenced seeking to
5 equitably subordinate that claim. There was no objection to
6 the claim. So it was the pristine issue which, if you will,
7 which is before this court, a claim that was not being
8 challenged as to validity or amount but rather was being
9 subject to equitable subordination. And Judge Gonzalez noted
10 that the very nature of equitable subordination is -- first it
11 is premised on an acceptance of the fact that the claim itself
12 is valid and allowed. And that what the party, the offensive
13 party, is seeking to do is exactly what is being sought in
14 Japan as acknowledged by Shinsei Bank which is to take an
15 allowed and valid claim, subordinate it to and reprioritize it
16 vis-a-vis other claims so the distributions that the claimant
17 would otherwise be entitled to are redistributed to others.
18 That, Judge Gonzalez noted, is offensive in nature, it is not
19 defensive in nature, and therefore is subject to the automatic
20 stay.

21 We believe, Your Honor, that the analysis undertaken
22 by Judge Gonzalez as set forth in Enron is the correct and more
23 persuasive analysis. It applies directly to this case. And
24 that Your Honor should, we suggest, should conclude that as in
25 Enron so to here the actions that Shinsei Bank has taken

1 through it's plan, and this is the primary focus of the plan if
2 not the singular purpose of the plan, to equitably subordinate
3 our allowed claim violates the automatic stay, that they are in
4 contempt for having taken that action and that, therefore, they
5 should purge themselves of that contempt by withdrawing their
6 plan.

7 Your Honor, unless the Court has any questions, for
8 the reasons I've stated and as reflected in our motion, we
9 believe that the relief we sought should be granted.

10 THE COURT: I have a couple of questions.

11 Your argument assumes that what is happening in Japan
12 is equitable subordination. I don't know if that's true or
13 not. Did the parties stipulate that that's what's happening or
14 is there any dispute with respect to the relief that's being
15 sought in Japan as a result of the Shinsei plan? The reason I
16 bring this up is that as far as I know, the term "equitable
17 subordination" if used in a Japanese court probably wouldn't
18 resonate.

19 MR. KRASNOW: Your Honor, that's why I, in my
20 argument, refer to Shinsei Bank's description of what they're
21 seeking to do which is consistent with what -- how we've
22 articulated it.

23 THE COURT: Well, I understand that their plan would
24 elevate their claim and the claims of others in the same class
25 and would subordinate or put in a more junior class claims in

1 which LB Asia and LBHI currently would be pari passu under your
2 plan, they'd be junior under their plan, correct?

3 MR. KRASNOW: Yes, Your Honor.

4 THE COURT: I don't know whether or not classification
5 for purposes of an alternative plan under the Japanese
6 insolvency regime is or is not the equivalent of equitable
7 subordination.

8 MR. KRASNOW: Your Honor, again, I would refer the
9 Court to Shinsei's reply where I don't believe they challenge
10 our characterization, and indeed describe in a defensive manner
11 that we don't believe it's meritorious, but in a defensive
12 manner that what they are seeking to achieve through the plan
13 is to reprioritize the claim, which is the terms actually used
14 by the courts and in the decisions that I've described,
15 including Judge Gonzalez's, as how we view equitable
16 subordination. And if one peruses the plan and opinions that
17 were filed by Shinsei Bank, the reasons why they believe that
18 the Lehman claim should be subordinated, and we're talking
19 about translations from Japanese to English, while the merits
20 of what they say certainly don't resonate with us, the
21 arguments that are being made resonate to me, anyway, in terms
22 of what I would often see when one comes across a claim that
23 someone is saying should be equitably subordinated.

24 So, Your Honor, I would submit that based upon the
25 pleadings that were filed in Japan, and again, Your Honor,

1 there's a translation issue, but what one doesn't have to
2 translate is, in fact, the objection that Shinsei Bank filed
3 and I think it's clear there that what they're talking about is
4 equitable subordination, in essence, as we know that.

5 THE COURT: I don't meant to elevate form over
6 substance, but one of the things I'm struggling with is that in
7 the ordinary course of U.S. Bankruptcy practice, a claim might
8 be equitably subordinated by means of an adversary proceeding,
9 or it might be subordinated by means of classification and then
10 there would be litigation concerning the reasonableness of that
11 classification. But there would be litigation, no doubt,
12 unless parties consented to the propriety of that
13 classification scheme.

14 In the context of a Japanese insolvency proceeding, it
15 is unclear to me whether or not as a matter of applicable
16 jurisprudence the District Court judge sitting and comparing
17 these two plans is involved in a litigation context in which a
18 party is taking shots at LBHI, or whether or not the court is
19 evaluating the reasonableness and fairness of two schemes and
20 making a decision yes, this one is fair, I will support this
21 one. I don't know how it works, and I don't know if there's a
22 distinction to be made. But it seems to me that if what a
23 foreign judge is doing consistent with applicable foreign law
24 is assessing the reasonableness of a distribution scheme, the
25 consequence of which may be adverse to a party in bankruptcy;

1 in this case LBHI, that's a perfectly reasonable thing for the
2 judge to do, and I don't think the automatic stay is
3 implicated.

4 MR. KRASNOW: Your Honor, I'm not going to necessarily
5 disagree with that, however, I certainly am not going to stand
6 up in front of the Court as someone who is facile and an expert
7 in Japanese law.

8 THE COURT: I suspect there's no one here about to
9 stand up and say that.

10 MR. KRASNOW: Having said that, Your Honor, I think
11 one can be informed as to the issue that Your Honor has raised.
12 By looking at the pleadings -- what I'll characterize as
13 pleadings, what are, I think, referred to as opinions, filed
14 with the Court's supervisor -- by Shinsei Bank, yes, by Lehman,
15 we did participate in that proceeding, we're not denying that.
16 And what, at least, I gleaned from those pleadings, those
17 opinions, and what each of the parties have put before the
18 Court's supervisor is not questions of classification, but
19 specifically whether or not equitable subordination is or is
20 not appropriate.

21 So, again, Your Honor, what I glean from those -- from
22 the position taken by Shinsei Bank and how they have
23 articulated them before the Japanese court it's apparent to us,
24 in any event, that what is at issue is precisely what would be
25 at issue here were there to be a proceeding commenced against a

1 party contending that their claims should be equitably
2 subordinated. Not does this party belong in that class or
3 another class.

4 THE COURT: Can you tell me how the treatment of the
5 LBHI claim under the Shinsei proposed plan in Tokyo violates
6 the automatic stay?

7 MR. KRASNOW: It is our position that it is -- if you
8 will form over substance to look at the manner in which Shinsei
9 is seeking to equitably subordinate; whether it is by an
10 adversary proceeding or how they have done it in the plan, that
11 that attempt to subordinate what is otherwise now a valid and
12 allowed claim, is for the reasons set forth in his analysis in
13 the Enron decision, in Judge Gonzalez' rationale, is an
14 offensive act, not a defensive act. And where a defensive act
15 would not violate the automatic stay, an offensive act, which
16 in this case is seeking to reallocate distributions we would
17 otherwise receive on our allowed claims, is taking control over
18 property of the estate, and is precisely what goes to the core
19 of the automatic stay and is a prescribed act.

20 THE COURT: Is it taking control over property of the
21 estate to obtain an order from a court of competent
22 jurisdiction regarding an appropriate distribution scheme under
23 applicable foreign law?

24 MR. KRASNOW: I will go back to what I said earlier in
25 my argument. It is in our view in the context of the specific

1 facts here. I am not prepared to stand up before Your Honor
2 and argue that every time there may be a plan proposed before
3 any Court, which affords one treatment for Lehman and
4 presumably other similarly situated creditor, and another, that
5 that is a per se violation of the automatic stay. If that's
6 what Your Honor is asking I can't say that it would be. There
7 might be facts and circumstances specific to a particular plan,
8 such as we submit has occurred in connection with the Sunrise
9 proceeding, where there would be a violation of the automatic
10 stay. But we're not -- I mean, the parade of horribles that
11 has been described, alluded to in certain of the objections,
12 that somehow for example, we're taking the position that if
13 somebody -- another creditor to a foreign debtor, for example,
14 files a claim in connection with that case because that would
15 dilute our distributions, that somehow that violates the
16 automatic stay, for us to assert that would be absurd, we're
17 not taking that position.

18 I'm reluctant to say there's a general rule, Your
19 Honor, because as we all know what the Court will render a
20 decision based on specific facts, and, again, we're saying the
21 facts here are such that what Shinsei Bank is doing is
22 violative of the stay.

23 THE COURT: Okay. I think I should hear from Shinsei
24 Bank's counsel.

25 MR. KRASNOW: Thank you, Your Honor.

1 THE COURT: Mr. Trost, good morning.

2 MR. TROST: Good morning, Your Honor.

3 Apparently, the motions are quite different that the
4 debtor filed. We apparently responded to a different motion
5 than the original motion, which complained of Shinsei conduct.

6 But before we get to that, let's correct the record on
7 one set of facts. The creditors in the Sunrise proceeding,
8 which is an administration proceeding, the by far -- the
9 biggest by far Lehman family creditor is LB Asia for 99.5
10 percent of the claims. Translating roughly, don't hold me to
11 these numbers from yen to dollars, LB Asia, which is in a Hong
12 Kong liquidation proceeding, with administrators, filed a claim
13 in the Sunrise case for roughly 2.4 billion dollars. LBHI,
14 which is the proponent of this motion, has filed a claim which
15 is now fifteen million dollars.

16 LB Asia is not a debtor in these proceedings. So what
17 the motion seeks in the second motion, because we misunderstood
18 apparently -- we and everybody else misunderstood the first
19 motion which had nothing about offensive and defensive. Just
20 says Shinsei was on the creditors' committee, and we abused our
21 position, and the automatic stay applies. By the way, the
22 debtor later retracted any suggestion in their supplemental
23 pleading, any suggestion of any kind of misconduct by Shinsei.

24 THE COURT: So there's no need to discuss it.

25 MR. TROST: Nothing to discuss on that. But the

1 creditors, the Lehman family creditors, look at the impact your
2 ruling would have if you ruled that we were in contempt of
3 court because we did not know that the automatic stay prevented
4 us from asking the Sunrise administrator to consider a plan
5 which treats the creditors' classification differently than the
6 Sunrise plan. And LBHI only has fifteen million dollars at
7 stake. Even if LBHI had everything, we would come out to the
8 same place the automatic stay could not possibly prevent the
9 Japanese proceeding from going forward.

10 And isn't it interesting that the debtor concedes had
11 we or some other creditor objected to the LB Asia claim in that
12 one week we had to do it, in the fall of 2008, between November
13 25th and December 2nd, is what they say. We could have done it
14 then, we could have said you have no claim at all, LB Asia. We
15 could have said you had no claim at all, LBHI. They admit the
16 automatic stay wouldn't affect that. But we are prevented --
17 because of that we are prevented from suggesting as you raised
18 the question that there are two plans that the administrator
19 should consider. One, that classifies the Lehman claim of
20 fifteen million dollars, and classifies the LB Asia claim of
21 2.4 billion dollars on a par with the third-party creditors,
22 that's one plan the Japanese administrator could deal with.

23 There's another plan the Japanese administrator could
24 deal with. And that plan treats the creditors differently,
25 like it would be common under our practice for people to

1 suggest that a class of creditors should not be treated
2 equally. And the facts in the case, I'm going to refer the
3 Court to some exhibits we filed as part of our declaration.
4 The facts in the case make it quite clear, that Sunrise was
5 "Capitalized by debt." It had almost no equity.

6 But LB Asia is not a debtor in these proceedings. How
7 could it be that the automatic stay in the United States
8 Bankruptcy Court could stop in its tracks the ability of
9 creditors to contest what the classification should be. We
10 didn't have time to file a declaration because we received the
11 reply sometime yesterday. I think it was filed -- they didn't
12 hold back, just that things happened over the weekend. But we
13 did ask our Japanese lawyers whether in spite of the fact that
14 the claims were allowed, whether a rehabilitation plan under
15 Japanese procedure could still reclassify the claims different
16 than they were allowed? And the answer is yes. I represent to
17 you and we would file such an affidavit, but I don't think it
18 makes any difference. LB Asia is not before this Court.

19 Let me go to a second series of facts. Your Honor has
20 all this in our exhibits. When Lehman filed their hypothetical
21 motion, the first motion they filed was a hypothetical motion,
22 which said all of these things. They referred -- they attached
23 in the declaration, I believe I have this correctly, three
24 pleadings that had been filed before the Japanese -- in the
25 Japanese court to be considered by the Japanese supervisor.

1 One on May 15th was a rehabilitation proceeding filed by
2 Shinsei. And it classified the claims different than had been
3 filed by Sunrise; the affiliate which is owned in the chain of
4 Lehman.

5 They also in the Japanese proceeding on May 22nd,
6 there was filed by Asia, may I just call Lehman Asia Holdings
7 Asia and LBHI, the debtor in this case, an objection to the
8 Shinsei plan. Those were filed in the movant's papers.

9 There was also filed by Shinsei an application to
10 amend the Shinsei plan. And then two very important documents
11 were omitted from the original motion. And these -- the
12 lawyers for the debtors all involved in this, Shinsei gave to
13 the -- these two are in our papers, not mentioned in the
14 papers, Shinsei filed an opinion brief, a brief, in support of
15 its classification of claims, which it had a right to do under
16 Japanese law. What did LB Asia and the debtor do? They didn't
17 come to this Court and say automatic stay violation, automatic
18 stay violated. This motion was filed on August 11th. They
19 didn't come to this Court when other papers were filed. At no
20 time when these papers were filed raising these issues under
21 Japanese law in a Japanese proceeding, before a Japanese
22 supervisor who is going to decide which of these plans to send
23 to creditors, they didn't come to this Court. They could have
24 come in -- they could have come on May 16th; the day after May
25 15th. They could have come on May 22nd. They could have come

1 on June 27th; the day after Shinsei filed an application to
2 modify its plan. They could have come on June 27th when
3 Shinsei said this is why we think our classification is proper.
4 They didn't come to this Court. And, moreover, on July 17th in
5 the English translation of sixty-seven pages, LB Asia and this
6 debtor jointly filed an opinion brief as to why its improper
7 not to classify these claims. That's what they did. Something
8 happened after July 17th that caused the debtor to consider the
9 fact hey, we better stop this. We better stop this proceeding
10 before the Japanese court. And, although, Mr. Krasnow, who's a
11 fine lawyer articulates -- tries to narrow the scope of what
12 he's seeking to do, if he were really seeking to punish this
13 offensive defensive kind of dichotomy that's how cases are
14 going to be decided, about whether you can proceed in a
15 Japanese proceeding. Why didn't they seek an injunction, why
16 didn't they file a complaint for an injunction? You would have
17 tossed it out.

18 So they've made all these arguments that they want to
19 make in the proper place in Japan. And if you were to do
20 anything -- and by the way, all of these papers are in our
21 declaration -- Mr. Kleiner's declaration, and they're not all
22 in Mr. Labine's declaration because they didn't tell you about
23 two of these things. They didn't tell you about their sixty-
24 seven page brief. Why didn't they tell you about that in their
25 opening papers?

1 THE COURT: Mr. Trost, let me ask you a question. Do
2 you know what the procedure is at this point in reference to
3 these two competing plans? And do you know, what, if any,
4 action is taken either by Shinsei or by Lehman entities in the
5 prosecution of one plan or the other? What happens next?

6 MR. TROST: Okay.

7 THE COURT: If you know. If you don't know that's a
8 perfectly good answer.

9 MR. TROST: I do know. I can tell you what I think I
10 know.

11 THE COURT: If that's the best you can do.

12 MR. TROST: But our Japanese clients are with us
13 today, they came in from Tokyo. This is a very, very, very
14 serious matter for Shinsei Bank.

15 MR. TROST: What happens -- isn't it telling that
16 we're spending all our time talking about what's happening in
17 Japan and what is the procedure in Japan and Mr. Krasnow do you
18 know and Mr. Trost do you know, and Your Honor is right. So
19 what happened in answer to your question. These two competing
20 plans are before our supervisor who is something like a
21 mediator. I mean, I think he is a person who wants the two
22 sides to come together. So one plan, and only one plan can go
23 out to creditors.

24 THE COURT: The supervisor is not a judicial officer?

25 MR. TROST: I think he's a judicial officer, but I

1 don't know that. But this is within the Japanese court system.
2 The Japanese civil court system, this is a bankruptcy
3 proceeding in the Japanese court system. And the supervisor
4 has these two competing plans, and he's going to recommend one
5 to the Court to be distributed to creditors to vote. That's
6 all I know. That's basically what I know. But he is very,
7 very important. The supervisor serves as the traffic cop in
8 terms of their plan process.

9 And as a matter of fact, the -- Shinsei in a pleading
10 that we are instructed by the supervisor we cannot incorporate
11 into the record, there was an effort to mediate this dispute
12 which the debtor turned down. Before the debtor turned it down
13 probably two weeks before they filed this motion. So the
14 answer to your question, I think I've answered it.

15 THE COURT: You have because you've qualified it by
16 indicating it's just what you know. But I want to ask you if
17 there's something else that you know. Which is whether
18 parties-in-interest, like Shinsei, or Lehman, have the ability
19 to engage the supervisor to take action in front of the
20 supervisor to influence the supervisor in terms of his exercise
21 of discretion, in terms of what's planned to adopt. That's
22 question one. And question two is, is there a procedure for
23 sending out the plans to creditors?

24 MR. TROST: I don't know the answer to the second
25 question. I do know the supervisor wants send one plan to the

1 Court and then go to creditors. And my understanding is they
2 communicate, the parties -- the Japanese lawyers communicate
3 with the supervisor. I'm not sure what the process is. My
4 guess is it's not formal.

5 THE COURT: All right, go ahead, I interrupted you.

6 MR. TROST: By the way, the LB Asia facts are all in
7 our brief, and I'm not going to -- as Mr. Krasnow did not, I'm
8 not going to go over all of that. All of the arguments are in
9 our brief, and I'll just try and hit the points which I think
10 are appropriate for oral argument. Because having sat through
11 the Court this morning, I know how busy you are.

12 When we received the reply brief which shifted the
13 focus of the motion, we learned for the first time that because
14 we did not -- because the claims were allowed to be treated as
15 allowed claims, that we are barred -- all creditors of
16 Shinsei -- of Sunrise are barred from taking any position of
17 any form which would treat the LB Asia claim. Let's just focus
18 on that one at less than parody with everyone else. We learned
19 that for the first time. We learned that we could have done it
20 had we filed an objection to the claim. The case was filed in
21 September, enormous case, you know what the Lehman case is, the
22 same thing over there. Nobody had any information. Alvarez &
23 Marsal was trying their best to gather the facts, and you know
24 what it's been like. So that's what we learned for the first
25 time. I almost have to pinch myself to say how do I address

1 this subject with a straight face. But I'm going to try and
2 address that subject with a straight face.

3 I've covered a number of these points.

4 THE COURT: Mr. Trost, let me break in and ask you
5 this. Do you accept the offensive versus defensive distinction
6 that has been articulated by counsel for Lehman in this
7 instance? In other words, assuming you had been on your toes
8 in that week that you describe as a remarkably brief period of
9 time to do something that's permissible, mainly object to a
10 claim. Assuming you would have objected to the claim, which
11 would have been offensive, that's permissible. But the taking
12 action to subordinate is impermissible because it's taking
13 action to exercise control over property of the estate. Do you
14 accept the jurisprudence that provides for that dichotomy of
15 behavior? In other words, defensive behavior is in the safe
16 zone, but offensive behavior violates the stay?

17 MR. TROST: I do not accept it, but you -- I submit
18 that you mischaracterized what Mr. Krasnow's position is. He
19 conceded to you that we are not seeking to enforce -- to
20 control property of the estate.

21 THE COURT: I think it's exactly what he said. That's
22 exactly what he said.

23 MR. TROST: That's not --

24 THE COURT: I heard him say when I asked him a
25 question tell me how what Shinsei is doing in Japan violates

1 the automatic stay and he said, unless I heard him wrong,
2 they're seeking to exercise control over property of the estate
3 by seeking to subordinate the claim, that's what I heard. Is
4 that what you said?

5 MR. KRASNOW: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. TROST: I do not accept it. You asked me if I
8 accept that, absolutely not. We are not seeking -- first of
9 all, how do you deal with LB Asia? LB Asia is not a debtor in
10 this proceeding. How could they -- and they represent 99.5
11 percent of the Lehman claim. They're not a debtor here,
12 they're not a party to this proceeding. They haven't sought an
13 injunction.

14 With respect to this issue that came up of offensive
15 and defensive, I'd rather go with Judge Posner in his two
16 cases, Martin Dragona (ph.) and the other case that we cite in
17 our footnote. We have a right to defend ourselves over there
18 in this Japanese proceeding. Assuming this even should be an
19 interest to an American court, it would be -- others are going
20 to address this. It would be a horrible precedent and barred
21 American bankruptcy law to have a rule that if a creditor files
22 a -- a debtor here files a 10,000 dollar claim in the UK
23 administration or the Japanese administration that you're done,
24 you can't go forward. And as of today they're saying they just
25 want to prevent our offensive conduct. Well, how does anybody

1 know what they can do in the Japanese proceeding? Shouldn't
2 this be for the Japanese supervisor and the Japanese court to
3 decide?

4 If you were to enter this order that we violated the
5 automatic stay and it's been conceded that we can do defensive
6 things but not offensive things, what do we do over there? If
7 the supervisor calls us and says he wants to talk to us and LB
8 Asia about what to do we got to go to Judge Peck in New York to
9 find out if we can go to the meeting. It just can't be. This
10 can't be -- others are going to address this comity issue. And
11 the fact that a fifteen million dollar claim by a debtor in a
12 case with two and a half billion claims triggers all this,
13 frankly, boggles my mind.

14 Now, with respect to the Enron case I do not
15 believe -- that was a case, by the way, where there was a
16 motion -- they're proceeding in that case was a complaint, an
17 adversary proceeding to subordinate, I don't think it makes
18 much difference. But I do not subscribe to that difference.
19 And I do not think it should be the law of the case in this
20 situation either.

21 So leaving time for others and knowing that you're
22 busy, I would just like to leave with this thought. I think
23 Lehman's position, LBHI's position is untenable. I could say,
24 but I'm not going to it's disingenuous because it came up at
25 the very last after all these papers were filed in the Japanese

1 court. And because we didn't object because Shinsei or the
2 other creditors did not object to the proofs of claim in the
3 one-week period does not mean even if you were to consider
4 somehow you want to get involve in all this mess over Japan,
5 does not mean we can't at the supervisor's request file a
6 competing plan of rehabilitation.

7 THE COURT: Did you say at the supervisor's request?
8 Did they supervisor request that this plan be filed, or did you
9 voluntarily file it?

10 MR. TROST: I don't know the answer. But I do know
11 that he now wants the two parties to get together on one plan.
12 So that I do know.

13 The supervisor -- my understanding is -- I'm not a
14 Japanese lawyer I didn't --

15 THE COURT: That's obvious.

16 MR. TROST: And I don't think any of us at this table,
17 on either side, knows the ins and outs of the Japanese
18 corporate reorganization law.

19 THE COURT: The reason I'm asking questions about it
20 and the reason I've asked you questions about it and I've asked
21 Mr. Krasnow questions about it is I'm trying to understand what
22 precisely is going on in a Japanese proceeding so that I can,
23 in my own mind, characterize it within U.S. jurisprudence as to
24 whether or not it does or it does not constitute a stay
25 violation. The mere fact that something is happening cross

1 border does not mean that it isn't a stay violation.

2 MR. TROST: Correct.

3 THE COURT: If Shinsei were to go into a Japanese
4 district court and seek to pursue claims against LBHI that
5 would be wrong.

6 MR. TROST: That's a different case.

7 THE COURT: Obviously. What I'm saying very
8 simplistically is the fact that there are proceedings occurring
9 in a foreign court that's simply an irrelevancy in terms of
10 analyzing whether the stay applies. It does apply to foreign
11 proceedings where 362(a) can be determined to be implicated.
12 What I'm trying to do determine as a matter of law is whether
13 what Shinsei has done in a set of proceedings that I am
14 unfamiliar with and so are you actually violates the stay. It
15 could violate the stay. The fact that it may create a parade
16 of horribles would be unfortunate. But one of the consequences
17 would be that if there is a stay violation someone would have
18 to come here and get stay relief. Parties in the past have
19 tried to do that, Shinsei did not. I'm not suggesting by these
20 comments that what Shinsei has done violates the stay, but it
21 could be that if, for example, what was done in the Tokyo court
22 was not the filing of a competing plan, but the commencement of
23 a complaint against LBHI, a creditor, in the Tokyo District
24 Court seeking to subordinate the claim that that would much
25 more clearly fit within Judge Gonzalez' Enron decision.

1 What I am struggling with and what you should
2 understand is that just because there are adverse consequences
3 to the strict application of U.S. law doesn't mean that U.S.
4 law should not be strictly applied. The question is whether or
5 not it should be applied in this instance. And in order to
6 apply it in this instance I need to understand the facts and I
7 really don't have them.

8 MR. TROST: I have two answers -- to points. The
9 first point is you have these papers, these are in the record.
10 I can give you a separate book. These are all the facts that
11 we have. And you will see what's going on as far as I know.
12 These are three pleadings from the debtors' motion and three
13 pleadings from our motions, all are in the declarations.

14 What is going on is that there have been competing
15 plans of reorganization, these are liquidation plans.
16 Competing plans of reorganization with different classification
17 of claims. And they're before the supervisor and the parties
18 have been filing briefs with the court which the supervisor
19 reads advocating one set, which is the Shinsei set which treats
20 the claims as subordinated. And one plan which treats them all
21 as pari passu. That's as much as I know what's going on.

22 Plus, the supervisor would like to get the parties
23 together so that they could agree on one plan. And that has
24 been rejected by the debtor.

25 The second point, Mr. Krasnow -- I don't think I

1 misunderstood this in the brief. He concedes that we had the
2 right to object to LB Asia and LBHI between November 25th and
3 December 2nd without coming to this Court to seek permission.
4 He concedes that in his written papers, he conceded it in oral
5 argument. So they have conceded that but for the fact that we
6 didn't do anything by December 2nd, this is converted into this
7 dichotomy of offensive and defensive, and all of a sudden we
8 violated the automatic stay.

9 THE COURT: I don't think he's conceding anything.

10 I --

11 MR. TROST: Oh, he does concede that, Your Honor.

12 THE COURT: No. I think what he was saying is that
13 for purposes of existing jurisprudence doesn't involve anything
14 dramatic, it's perfectly permissible for a party in a second
15 debtors' bankruptcy case to object to a claim filed by the
16 debtor from a first bankruptcy case. That a proof of claim in
17 which the debtor submits to the jurisdiction of another court
18 can be objected to principally without stay relief.

19 So what he is saying, however, if I'm understanding
20 his argument, is that that's different from filing an adversary
21 proceeding seeking to subordinate an allowed claim.

22 MR. TROST: We haven't filed an adversary proceeding,
23 that I can tell you.

24 THE COURT: I understand that. And one of the reasons
25 that I am asking as many questions as I have asked regarding

1 what is going on in the Tokyo District Court is to try to
2 determine procedurally whether or not it is or is not
3 comparable in any way to adversary proceeding practice, or
4 taking offensive action, or doing anything procedurally that
5 would be deemed the exercise of control over property of the
6 estate. Because if it's any of those things the stay is
7 violated. If it's not, if it's characterized as this is just
8 ordinary course Japanese practice in which competing plans are
9 submitted, it happens all the time, and the supervisor looks
10 left and looks right, weighs them and compares them, says I
11 like this plan better and throws it out for a vote, I'm not
12 sure that violates anything.

13 MR. TROST: That's where they are, the latter. And I
14 would raise this point --

15 THE COURT: I appreciate the fact that you've said but
16 you've also said you're not a Japanese lawyer and I accept that
17 fact, and I'm not sure I can accept that representation. So
18 what I don't know from the stack of papers that I have, I
19 believe this is that binder, what I don't know from that stack
20 of papers, despite all of the translations from Japanese into
21 English is procedurally exactly what happens next. And
22 procedurally what has happened in Japan. Is there a court like
23 this, with people sitting around and a record maintained, is
24 there due process of the sort that we ordinarily expect in a
25 U.S. Bankruptcy Court. I recognize that the procedures are

1 different, I recognize that Japanese legal proceedings are
2 entitled to respect in this country, the due process as we know
3 it is accorded, but it differs from situation to situation. I
4 don't know enough about it to know whether or not rights of
5 creditors are fully respected and protected. I just don't
6 know. And I suspect there isn't a person in this courtroom who
7 really does. But if there is I'd like to hear from him or her
8 if there's a position to express in this point. And if we
9 don't have a position to express on this point I expect
10 supplemental briefing.

11 MR. TROST: I would make one point and I'll sit down.
12 LB Asia. Does it under any stretch of the imagination how
13 could the automatic stay prevent any creditor from opposing LB
14 Asia, which is not a debtor in this proceeding. The allegation
15 in the debtors' motion is they have the beneficial interest in
16 the recovery. But LB Asia is in a liquidation proceeding with
17 joint administrators in Hong Kong.

18 THE COURT: I'm not dealing with LB Asia for purposes
19 of what I just articulated. To the extent that there's a stay
20 violation as to LBHI that's really all that matters for purpose
21 of today or, frankly, the next day that we have a hearing after
22 supplemental briefing.

23 I view the LB Asia issue to some extent a red herring
24 comparable to Lehman ALI in the case of SunCal which was
25 referred to by debtors' counsel. Lehman has a lot of entities

1 and most of them are not in bankruptcy. Those that are in
2 bankruptcy are entitled to stay protection, those that are not
3 in bankruptcy are not entitled, but there may be derivative
4 benefits.

5 MR. TROST: Thank you.

6 THE COURT: Is there anyone else who wishes to speak
7 at this point on this subject? Mr. Flics.

8 MR. FLICS: Your Honor, Martin Flics of Linklaters LLP
9 on behalf of the joint administrators of the Lehman European
10 Group administration companies.

11 I will be very brief and thank you for hearing me
12 today. I assure you that I have absolutely no insight to offer
13 on Japanese bankruptcy law. And it may be that the decision in
14 this matter does turn on some specific matters relating to
15 Japanese bankruptcy law. And so I will just make a few general
16 comments for whatever they are worth.

17 First, Your Honor, the original motion when we read it
18 did cause us some degree of concern based on the arguments that
19 it made and based upon a bit of a floodgates argument that was
20 actually mentioned, I believe in paragraph 35 of the motion,
21 that if we allow this other creditors will -- may do similar
22 things, whatever similar might mean. And we did attempt to
23 contact the debtors' counsel to get some comfort on that, we
24 weren't successful to do that and that was the reason we felt
25 that it was appropriate to file the pleading that we did.

1 Your Honor, speaking at a very general level.
2 Obviously, we all know there a many foreign insolvency
3 proceedings. I suspect that just at this is the biggest
4 bankruptcy case ever, I believe there are probably more foreign
5 solvency proceedings with respect to this entity than there
6 ever has been. And it is the nature of insolvency proceedings,
7 I believe, it is fair to say, that there is an ordinary
8 process. There are many differences, of course, among
9 insolvency regimes, but there's a fairly ordinary process. And
10 that is some process of some type is commenced. And that
11 creates an estate of some type. And then creditors, or other
12 claimants, with respect to that estate enter into that process.
13 They open the door, if you will, and enter into that process if
14 they choose to assert their claims.

15 Now with respect to those claims there is no right to
16 a recovery until the end of that process when the Court or
17 whatever appropriate authority determines that there is a right
18 to that recovery. In this case, as far as I can determine,
19 there is no suggestion of any effort to obtain an affirmative
20 recovery against LBHI or LB Asia, they are in the midst of an
21 insolvency proceeding, and the issue is what will be the
22 distribution on the claim of LBHI or LB Asia. Now, I've
23 admitted I know none of the details, but it strikes me that
24 it's not an uncommon situation, it is precisely in a general
25 way the sort of situation that is faced in insolvency

1 proceedings around the world, hence the concern.

2 And I believe the case law in discussing offensive or
3 defensive, you can get bogged down in what is the meaning of
4 offensive or defensive, and I would submit that if you were not
5 seeking an affirmative recovery, but you are just being heard
6 in that proceeding with respect to the claim that has been
7 asserted, then it's a wholly artificial distinction to allege
8 whether or not there's some concept of allowance in the middle
9 of the process that you have chosen to enter.

10 Your Honor, I'll also just address for a moment Mr.
11 Krasnow's comment that we really shouldn't be concerned because
12 we are -- we're not affecting the jurisdiction of a court here,
13 I mean, we're not saying Court, you can't do this. But, in
14 fact, if there is an improper affect on creditors and there are
15 many with many claims in many proceedings, then, in fact, if
16 those creditors cannot or will not or are concerned about
17 bringing actions that they are lawfully entitled to bring, then
18 foreign courts and other tribunals will not, in fact, have the
19 ability to make the proper determinations because it will never
20 be brought before them.

21 Your Honor, finally, I am not aware that any party of
22 the debtor has cited to any case, doesn't mean there couldn't
23 be one, now we're in the future, any case in which a court has
24 enjoined the actions of a creditor in a foreign insolvency
25 proceeding in taking actions in respect of a claim that has

1 been voluntarily submitted and asserted in the course of that
2 proceeding.

3 And for those reasons, I would urge the Court to
4 overrule the motion. Thank you.

5 THE COURT: Are there others who wish to be heard on
6 the side of opposition to the Lehman motion?

7 MR. O'NEAL: Your Honor, Sean O'Neal, Cleary Gottlieb
8 on behalf of three European banks that have filed objections.

9 I'll make this extremely brief. We appreciate the
10 Court's understanding as to why other creditors would be
11 interested in this proceeding. Our point is simple, that entry
12 of this contempt order could have broad applications outside
13 the U.S. and we appreciate Your Honor being cognizant of those
14 concerns. And we do understand there are situations in which
15 creditors' actions outside the U.S. Can, in fact, impact the
16 automatic stay. However, our concern here is that we need to
17 proceed very carefully and the Court needs to proceed very
18 carefully, as we know it will, in applying the automatic stay
19 to the legitimate exercise of creditor actions outside the
20 U.S., when those actions are actually in accordance with the
21 applicable foreign law.

22 We echo Mr. Flics' concerns and the sentiments
23 expressed in the objection. We highlight a few particular
24 concerns which is that at this point in which I think Your
25 Honor is fully aware, that the facts and circumstances are not

1 sufficiently clear to the Court to determine whether or not
2 relief is appropriate. And we should keep in mind that it is
3 the debtors' burden to make that showing.

4 It is also unclear to us whether really the Enron case
5 on subordination, as Your Honor noted, is really applicable in
6 this context where we are dealing with concepts under Japanese
7 law. I think those -- and it can also be said that many of the
8 cases that are relied upon in this Court have been cases
9 involving U.S. proceedings, and I think we have a fundamentally
10 different issue when we're dealing with proceedings outside of
11 the U.S., due to comity and related concerns.

12 And at any rate, I think we should all keep in mind
13 that the distinction between equitable subordination and claims
14 disallowance as set forth in the Enron decision is not entirely
15 clear, not all courts have come to that view, which makes sense
16 given that the overall result is relatively the same, which is
17 no recovery.

18 And then I think, finally, Your Honor, we would
19 express concern, both about the request for relief in favor of
20 nondebtor entities, I think that has been discussed here today.
21 And the concern that the normal distinction that we've seen in
22 U.S. Cases between offensive and defensive actions might not be
23 able to be uniformly applied across jurisdictions. So I don't
24 think the Court and the litigants should immediately jump to
25 the assumption that that normal dichotomy that is applied in

1 U.S. cases really makes sense in this context.

2 And with that, Your Honor, I think that's all we have.

3 And we appreciate your hearing our concerns.

4 THE COURT: Okay, thank you. Is there anyone else who
5 wishes to be heard before Mr. Krasnow gets a chance to talk?

6 MR. KRASNOW: Thank you, Your Honor, I'll be brief.

7 First of all, Your Honor, we certainly take the
8 position that creditors shouldn't be permitted to do in foreign
9 jurisdictions what they can't do here. To allow them to do
10 that would allow creditors of the estates who otherwise have
11 access or the ability to get judgments outside the United
12 States to be able to do so while creditors who may not be in
13 the similar position to get that advantage. The automatic stay
14 applies in an extraterritorial sense.

15 Secondly, Your Honor, if Your Honor accepts our view
16 of the affective equitable subordination, which is to divert
17 recoveries that otherwise would be made to the debtors to
18 somebody else, that is an affirmative recovery.

19 Lastly, Your Honor, I am not going to argue what
20 Japanese law is or is not, I will observe, Your Honor, that it
21 is certainly our understanding, if I can phrase it that way and
22 Your Honor will accept that, that the plans were not filed,
23 either Sunrise or Shinsei's at the invitation of the court's
24 supervisor. It is our understanding there was a deadline for
25 the filing of plans. The plans were filed consistent with that

1 deadline. Yes, Your Honor, I noted in my argument, there were
2 then opinions or briefs filed by both sides with respect to the
3 plan that Shinsei filed. Those were filed with the court's
4 supervisor. It's our understanding that the Court's
5 supervisor, I analogize it to some extent, like a magistrate
6 considers the legal issues in the plans and then makes a
7 recommendation to the District Court. It is my understanding
8 that there are communications that are had between the
9 supervisor and the parties. And, in fact, I'll use
10 understanding again, that the supervisor has reached out to
11 Sunrise, has requested that it makes certain modifications to
12 its plan; the Sunrise plan, totally unrelated to the issues at
13 hand.

14 Having said all of that, Your Honor, we would suggest
15 to take up with the Court's observation, that the appropriate
16 next steps may well be that there be supplemental declarations
17 that are filed, not by U.S. lawyers interpreting what Japanese
18 lawyers tell them the law is in Japan, but rather that we
19 solicit from our Japanese counsel a declaration which responds
20 to Your Honor's inquiries, so Your Honor could better
21 understand and, perhaps, all of us can, exactly what the
22 process is in Japan.

23 Certainly, it is our view that based upon our readings
24 of the plans that have been filed in the Shinsei plan, that
25 what they are doing through the plan is the equivalent of an

1 adversary proceeding, if you will. But I know Your Honor is
2 not going to be terribly swayed by our views in that regard.
3 And so I think that is the appropriate and reasonable next
4 steps.

5 THE COURT: That sounds right to me. I think it would
6 be useful to the process and certainly will inform me if I have
7 sworn declarations from Japanese lawyers who are involved in
8 the Sunrise proceeding and who are able to provide some first-
9 hand knowledge of what the process is all about; what has
10 happened so far, what is currently being decided by the
11 supervisor, and what will happen next.

12 I'm also fairly interested in knowing something which
13 is almost the ultimate question. And that is who's doing the
14 subordination, who's doing the classification? It seems to me
15 and I may be putting too fine a point on this at the end of the
16 argument, that if the supervisor is being given plans to
17 consider for recommendation to the court, and the court in
18 Japan is then is authorizing that a particular plan be
19 distributed to creditors for their approval, that at that point
20 Shinsei is doing nothing. At that point the court is doing
21 something consistent with applicable Japanese insolvency law to
22 effect an equitable distribution. That is not a violation of
23 the automatic stay in my view.

24 So part of the question that I'm wrestling with is who
25 is doing what to whom and how are they doing it?

1 MR. KRASNOW: Yes, Your Honor.

2 THE COURT: And I'd like more information on the set
3 of questions.

4 MR. KRASNOW: It's our position that Shinsei through
5 it's plan is, in fact, seeking the subordination.

6 But having said that, Your Honor, we will reach out to
7 our Japanese counsel. I would suggest that since I know
8 speaking for ourselves, I can't commit timing wise in terms of
9 the filing of a declaration, I suspect that Mr. Trost is in a
10 similar position, that we each speak to our respective counsel,
11 speak to one another so that we can agree upon a date for the
12 filing. And if we can't agree then seek the Court's advice or
13 intervention in that regard, rather than agreeing to a date
14 right now.

15 THE COURT: I think that makes sense, too.

16 MR. TROST: I think that makes sense. What I was
17 going to inquire. I assume you would like one declaration by
18 somebody and that we each have -- the lawyers ought to be able
19 to agree or point out where the Japanese lawyers disagree as to
20 what the process is. I don't expect that but would you -- is
21 that what you -- you don't anticipate each of us filing a
22 declaration?

23 THE COURT: Well, I, frankly, didn't have any
24 anticipation. Although, when I said what I said, I was
25 assuming that that there'd be two declarations. I was assuming

1 that there would be one from counsel for Sunrise, or for Lehman
2 in Japan, that there would be another from Shinsei's counsel.
3 If they could agree on one declaration that would be great, but
4 I have a strong sense that there might be areas of
5 disagreement.

6 MR. KRASNOW: I was about to say, Your Honor, we would
7 be pleased and encouraged Shinsei adopting our views as to what
8 the results would be here. And I accept Mr. Trost's
9 proposition in that regard.

10 MR. TROST: We'll try.

11 MR. KRASNOW: Why don't we see -- I envisioned there
12 would be two separate declarations. If, in fact, our
13 respective counsel absolutely agree on their interpretation of
14 Japanese law, it is what it is.

15 THE COURT: Then it suggests that it truly is a great
16 system over there. And I'll see you next time, but I'll wait
17 to hear from you as to when next time will be.

18 MR. KRASNOW: Thank you, Your Honor.

19 THE COURT: We're adjourned to 2 o'clock for a
20 2 o'clock calendar.

21 MR. KRASNOW: Thank you, Your Honor.

22 (Recess from 12:31 p.m. until 2:09 p.m.)

23 THE COURT: Be seated, please.

24 MR. KOBAK: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.